IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CIVIL REVISION APPLICATION NO.24 OF 2007

Commissioner,
Kolhapur Municipal Corporation,
Kolhapur & Anr. : Applicants
(Orig.Opponents)

V/s.

M/s.Fairdeal Constructions through
its proprietor K.N.Jyotinadran : Respondent
(Orig.Claimant)

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Mr.P.K.Dhakephalkar i/b. Mr.S.S.Patwardhan for the applicants.
Mrs.Atul Rajadhyksha i/b. Mr.Kedar Wagle for the respondent.

...

WITH

CIVIL APPLICATION NO.175 OF 2007

In

CIVIL REVISION APPLICATION NO.24 OF 2007

M/s.Fairdeal Constructions through
its Proprietor K.N.Jyothindran : Applicant

(Orig.Respondent)

V/s.

Municipal Commissioner,
Kolhapur Municipal Corporation & Anr. : Respondents

(Orig. Applicants)

...

Mrs.Atul Rajadhyksha i/b. Mr.Kedar Wagle for the applicant.

Mr.P.K.Dhakephalkar i/b. Mr.S.S.Patwardhan for the respondents.

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CORAM : S.A.BOBDE, J.

Date of Reserving the Order.) : 03.10.2007

Date of Pronouncing the Order.) : 02.11.2007

O R D E R:

1. The question that falls for consideration in this case is whether the order in question made by the Sole Arbitrator dated 23.11.2005 is an executable award.

2. The order in question declares that the respondent is entitled to certain payments without a specific direction to the applicants to pay the sums to the respondent.

3. The respondent has instituted a claim of money against the appicant-Kolhapur Municipal Corporation, hereinafter referred to as the "applicant".

4. The claim arises in respect of a contract for collection of octroi on the entry of goods within the limits of Kolhapur city in or about 1995-96 whereunder the respondent was appointed as an agent for such collection. There were some disputes between the parties and, therefore, the agreement with the respondent was terminated. The respondent then invoked clause 19 of the Agreement which provided for arbitration and one Dr.Nitin Kareer was appointed as an Arbitrator to decide the dispute. The Arbitrator eventually resigned without completing the arbitration.

5. The order in question was passed by the Sole Arbitrator i.e. the Commissioner of Kolhapur Municipal Corporation, upon recording a statement made by the applicant that the respondent is entitled to receive certain amounts.

6. On the next date, the Arbitrator wrote a letter to the Corporation, stating that the final hearing on the interim order will take place later. Admittedly, no such hearing has taken place. The Arbitrator himself has resigned by a

letter in April 2006.

7. The respondent levied execution of the order in the Court. The applicant objected to the execution on the ground that the order is not executable. The Court rejected the objection. Hence, this revision.

8. Mr.Dhakephalkar, the learned counsel for the applicant, submitted that the order is merely declaratory of the respondent's entitlement to receive the sums of money referred to therein and is not an award and is, therefore, not executable. He further submitted that the concession made by the applicant before the Sole Arbitrator is not valid and binding and could not have been opened by the Sole Arbitrator.

9. It is, therefore, necessary to construe the interim order, said to be an executable order by the respondent, and opposed as being one by the applicants. Though normally it would have been sufficient to construe the order itself, considering the controversy surrounding it, it is also necessary to see the attendant circumstances. A plain reading of the order reveals that the learned Arbitrator has referred to each of the issues and at the end of the issues has stated the amounts which can be said to be due to the respondent from the Corporation. Towards

the end, the learned Arbitrator has observed as follows:-

"Thus the total amounts wrongfully collected from the Claimant by Kolhapur Municipal Corporation are:

Sr.No.	Particulars	Amount in Rs.
1.	Excess payment	1,77,29,988.69
2.	Current account holders	95,07,033.00
3.	Motor memo account	1,15,249.00
4.	Jaggery	11,08,782.00
5.	Nakas not handed over	3,12,389.00
	TOTAL	2,87,73,441.69
	SAY	2,87,73,442/-

"

Thereupon, the Arbitrator has observed that the applicants must pay interest equal to the PLR of the SBI for each year from 1996-97 on the amount that has been calculated in the earlier para. The exact rate of interest is not specified. Thereafter, the Arbitrator

has observed as follows:-

> "It needs to be clarified here that these amounts worked out through a process of reconciliation have been agreed by the parties without prejudice to their claims. These amounts do not necessarily support or disprove the contentions of the parties regarding illegal termination of contract, but do address the other issues which have been raised from time to time.
>
> The parties are given a final opportunity to submit their say on the original issues framed regarding the contract termination. The final hearing will be held on 3.12.2005, at 11.00 a.m. in the office of the Municipal Commissioner, Pune Municipal Corporation, Pune."

The Arbitrator has nowhere in the order stated that the applicants are, therefore, directed to pay the amount determined in that order. The question is, therefore, whether the interim order should be considered to be an award enforceable under the Code of Civil Procedure, 1908 as if it were a decree of the Court as provided for in section 36 of the Arbitration and Conciliation Act, 1996.

10. According to Mr.Dhakephalkar, the learned counsel for the applicants, the interim order is not an interim award, nor was it intended to be one. It is a tentative declaration of the respondent’s entitlement based on certain concessions made by the respondent-Corporation before the Arbitrator. The applicants also contended that the surrounding circumstances also disclose that the

interim order was not intended to be executable. Had that been the intention, the learned Arbitrator would have clearly stated so in the operative part of the Award.

11. Mr.Rajadhyaksha, the learned counsel for the respondent, submitted that it is not necessary that an award, interim or final, must contain a direction to pay and it is sufficient if the Arbitrator indicates the entitlement of a party to a thing. The learned counsel relied on a passage from Law and Practice of International Commercial Arbitration, Fourth Edition, by Alan Redfern where the author has stated that there is no internationally accepted definition of the term "award". The closest comes to a definition is:

> "'Award' means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determines any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award."

The above passage does not help the Court in laying down what should alone be treated as an award. The learned counsel also relied on another passage which highlights the difference between an 'award' and a procedural order. The distinction between the term "award" and a procedural

order and direction is clear. But this case does not turn on a distinction between an ‘award’ and a procedural ‘order’. It turns on the answer to the question whether an award which does not contain a definite direction to pay a certain sum of money by one party to another would be treated as executable.

12. Mr.Rajadhyaksha also relied on a note on an English decision in Matson and another v. Trower and another where the Court appears to have over-ruled the objection of the defendant that the order of the Umpire was a mere opinion to the effect that one of the parties was entitled to claim certain sum of money for non-performance of their contract, in the following words:-

> ".....the umpire here was a mercantile man, and the defendants not having expressed a desire to be present at the examination of the plaintiffs, cannot now object to its having taken place in their absence. The words of the instrument are indeed not formal or technical, but they amount in substance to an award."

It is, however, not safe to rely on this note of the case which does not give a complete picture. Apparently, the Court felt that the defendants were not entitled to object since they did not express any desire to be

present at the evidence. The objection appears to have been taken purely on the ground that the deposition of the other side was allowed to be recorded in the absence of the defendants.

13. On the other hand, Mr.Dhakephalkar, the learned counsel for the applicants, relied on certain passages from Russell on Arbitration, 16th Edition, page 285 which reads as follows:-

> **When award will not be enforced as a judgement?**
>
> An award will not be enforced as a judgement under the section, but the successful party will be left to bring an action on the award in the following cases:
>
> 1. .....
>
> 2. Where the award is declaratory only, for instance where it ascertains only the amount to be paid, and not the liability in law' to pay. "Where there has been nothing more than a quantum or amount adjudicated upon, and no adjudication as to the liability of the person who is called upon to pay the amount, in my judgement the section does not apply."

This passage from Russell is more appropriate. In my view, therefore, it would be appropriate to clarify the interim order in question as an award which only ascertains the amount to be paid and not the liability in law to pay.

14. The Arbitration and Conciliation Act, 1996 which applies to the present case does not define an award. Section 31 lays down the form and contents of an arbitral award, but that section does not expressly resolve the problem at hand. Sub-section (7)(a) and (b), however, indicate that where an award is for the payment of money, it should contain a direction that a sum determined therein should be paid. The indication comes from clause (b) of sub-section (7) which reads as follows:-

> "(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment."
>
> (Emphasis supplied)

In my view, therefore, the interim order construed by itself cannot be said to be an interim award capable of execution because it fails to give a specific direction for the applicant to pay a certain sum of money to the respondent. However, another surrounding circumstance which indicates that the Arbitrator did not intend to give a final direction of payment by the interim award. On 24.11.2005 i.e. the day after he passed the order, he wrote a letter to the Commissioner, Kolhapur Municipal Corporation, to the effect that he was enclosing a copy of the interim order for information. He further states

in the letter that the parties are requested to appear before him on 3.12.2005 at 11 a.m. for giving their say on the interim order. It is clear, therefore, that the Arbitrator did not intend to give effect to the interim order. It matters not, therefore, that the Arbitrator has while resigning as an Arbitrator stated that he has passed an interim order on 23.11.2005 and has stated that the interim order was passed directing the respondent to make certain payment to the claimant pending the final hearing and disposal. In my view, therefore, whatever words the Arbitrator may have chosen, it was incumbent for him to have made a clear direction to make payment for a certain sum of money if he so intended.

15. In the result, the Civil Revision Application is hereby allowed in terms of prayer clauses (B) and (C) which read as follows:-

> "B) That this Hon'ble Court be pleased to examine the legality and validity of the impugned judgement and order dated 9th January, 2007 passed by the learned District Court II, Kolhapur below Exh.1 in Special Darkhast No.1 of 2006 Exh.F hereto and be pleased to quash and set aside the same.
>
> C) That this Hon'ble Court be pleased to hold that the execution levied by the respondent herein being Special Darkhast No.1 of 2006 pending on the file of learned District Judge II, Kolhapur is not maintainable and further be pleased to dismiss the

same."

16. In view of the disposal of the Civil Revision Application, on orders on Civil Application no.175 of 2007 and the same stands disposed of.

S.A. BOBDE, J.